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IN THE

Supreme Court of the United States

October Term, 1962

No. 1058

ERNESTINE GREENE,
Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE, LOS ANGELES, CALIFORNIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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To the Honorable Chief Justice Earl Warren and to the Honorable Associate Justices of the Supreme Court of the United States:

Your petitioner, Ernestine Greene, respectfully petitions this Honorable Court for a writ of certiorari directed to the United States Court of Appeals for the Ninth Circuit to review and reverse an order of the United States Court of Appeals for the Ninth Circuit affirming an order of the Immigration and Naturalization Service to deport her.

JURISDICTION

Jurisdiction is conferred by Title 28, Section 1254 (1), U.S. Codes. The decision of the United States Court of Appeals was handed down January 17, 1963. This petition for certiorari is filed within 90 days and the time extended by Justice Douglas to May 1, 1963.

OPINION BELOW

The opinion below is reported in 313 F. (2), 148 and is attached to this petition for certiorari.

TREATIES, CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Treaty between the United States of America and Austria, signed at Vienna, June 19, 1928 and January 20, 1931; Treaty Series No. 838 and 839 Proclaimed by the President of the United States May 28, 1931:

". . . The nationals of each High Contracting Party shall enjoy freedom of access to the courts of justice of the other on conforming to the local laws, as well for the prosecution as for *the defense of their rights,* and *in all degrees* of jurisdiction established by law . . . (Italics ours)

Fifth Amendment to the Constitution of the United States:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

8 USCA § 1251 (2) (12):

(a) Any alien in the United States . . . shall, upon the order of the Attorney General, be deported who . . .

(12) by reason of any conduct, behavior or activity at any time after entry became a member of any of the classes specified in paragraph (12) of section 1182(a) of this title: . . .

Section 5(b) of Public Law 87-301:

. . . Any judicial proceeding to review an order of deportation which is pending unheard in any district court . . . on the effective date of this section . . . shall be transferred for determination in accordance with this section to the court of appeals having jurisdiction . . .

§242.10 *Representation by counsel.* The respondent may be represented at the hearing by an attorney or other representative qualified under Part 292 of this chapter.

(c) *Use of prior statements.*[1] The special inquiry officer may receive in evidence any oral or written statement which is material and relevant to any issue in the case previously made by the respondent or any other person during any investigation, examination, hearing, or trial.

STATEMENT OF THE CASE

The petitioner is a young married woman, originally a native and citizen of Austria, who married an American soldier in Austria and came to the United States. She was lawfully admitted to the United States for permanent residence on June 28, 1952. Her name was originally Ernestine Maria Magdalena Pongracic. She married Mr. Drake, an American soldier, in Austria in 1951. That marriage was terminated by a divorce in 1953 in the State of Oklahoma, U.S.A. She does not have any children by this marriage. She went out of the United States on two occasions subsequent to her admission on June 28, 1952. The last entry by her, after a trip to Mexico, occurred in the year 1959. All the events with which she is charged occurred prior

[1]It will be noted that no provision is made for Counsel at the hearing of the "Special Inquiry Officer." Thereafter the statement taken by him becomes admissible evidence to deport. It smacks of totalitarianism.

to her last entry into the United States. She was married again to an American in 1960 and has been living in the United States ever since.

After her last entry into the United States she lost her identification card and applied to the Immigration Service for another card. As a result of this loss she appeared at the Immigration Service and an investigator took her sworn statement on two different occasions, to-wit: March 7, 1960 and April 6, 1960.

In these statements the investigator did *not* inform her of her right to have counsel at all stages of the proceedings, or at the investigating level. His statement solely was as follows:

> "Mrs. Drake, you are informed that I am an Investigator in the United States Immigration and Naturalization Service and as such am authorized by law to administer oaths and take testimony in connection with the enforcement of the Immigration, Nationality and Alien Registration laws of the United States. I desire to ask you some questions. You do not have to answer my questions. Any statement which you make should be voluntary and you are warned that anything you say here can be used by the Government as evidence in future civil or criminal proceedings against you or anyone else. Do you understand?"

Again on April 6, 1960 the investigator, William Barrow, took her statement with a stenographer present. Again, she was not advised that she had the right to an attorney, or be advised before she spoke.

These two statements, made when no attorney or even a friend was present to advise her, are the basis for her deportation. At no time was she warned that her statements might be the basis for deportation proceedings. On May 4, 1960 deportation proceedings took place before Hearing Officer Benjamin C. Myron. On May 10, a different hearing officer presided. He was Bert F. Kearney, Special Inquiry Officer, at Los Angeles, California, at which time she was represented by counsel and denied the various charges and deportability contained in the order to show cause. The decision of the hearing officer who ordered her deported was based on matters presented by the previous investigating officer in the statements taken from the petitioner before she was represented by counsel and without any advice that she had the right to be represented by counsel, and upon matters that would be deemed highly self-incriminating and objectionable and in violation of the Fifth Amendment to the Constitution of the United States, had she been represented by counsel at that stage of the proceedings.

Furthermore, all of the alleged acts took place prior to her last entry into the United States and could not be used to sustain the charge as stated in the order to show cause.

During the course of the secret inquiry by the original investigating officer he asked her regarding her sexual relationship with other men. Without benefit

of counsel and without being informed of her rights, she was asked if she had sexual relations with a man named Jim Watson. Upon asking the hearing officer whether she had to answer that, he asked her like a policeman giving the third degree if she refused to answer. She said "No." Later she stated that she had had sexual relations with Jim Watson once and he had given her no money for any such relationship. She was asked if she had ever worked as a call girl, which she denied. She was asked if she knew other girls who worked in various stores, and she said she did receive $10 from Jim Watson and she gave it back to him. She was asked if she was ever in Las Vegas. She said she was there a week or two but did not live there and did not work there as a prostitute.

A number of other questions were asked her about where she lived and how much rent she paid and whether she received any income by working as a "prostitute." She said that she was in the dressmaking business.

The investigating officer asked her leading questions, such as "But part of your source of income was from 'prostitution,' is that right?" Answer: "Partly, yes," all without the benefit of counsel. She stated that she had been convicted in the Beverly Hills Court on May 2, 1957 (which was prior to her last entry into the United States) and that she had not engaged in prostitution since that time. She said she had been going with one man, named Gene Greene, whom she

has married. He used to manufacture handbags and also different lines of women's clothes. At the time of this statement she had been going with Mr. Greene and intended to marry him. (She has since married him.)

In her second statement she testified that she designs as a free lance designer for clothes. She was asked by the investigating officer if she knew what the term "prostitute" means and he gave her a definition as "women who have sexual relations with men for money." She told the officer that sometimes people gave her $100, sometimes $50, as a gift.

Both of the statements which form the *sole* basis of the orders of deportation were taken and secured not only in the *absence of counsel*, but in the absence of *any advice to the petitioner that she was entitled to counsel*. During the pendency of the petition to review the deportation orders based upon the statements of the investigating officers, the case, which had been in the District Court of the United States, was transferred to the United States Court of Appeals for the Ninth Circuit pursuant to Section 5(a), now 8 USC Section 1105(a), of Title 8, and no hearing was held in the District Court.

QUESTIONS PRESENTED

1. Whether an alien is denied due process of law guaranteed by the Fifth Amendment to the Constitution of the United States when she is interviewed and her statement is taken by an Immigration officer for the purposes of a deportation proceeding without the alien being advised that she is entitled to be represented by an attorney and to be advised by an attorney before the hearing.

2. Whether an alien is entitled, by reason of the treaty of the United States with Austria, to the free access to all the courts in the defense of her rights and the protection and guarantees of the Fifth Amendment to the Constitution of the United States.

3. Whether an alien, who has been legally readmitted to the United States after having departed from the United States, can be deported by reason of occurrences prior to her last admission to the United States, or whether her legal readmission is *res judicata* of her right to remain.

4. Whether the evidence of a hearing officer, taken privately and without any friend or counsel being present and without any advice as to the rights to counsel and to a fair hearing, is substantial evidence and sufficient to be competent evidence upon which to base an order of deportation. (*Ronaldi v. Perfetto*, 235 U.S. 115; 2 L. Ed. 144; *Ng Fung Ho v. White*, 259 U.S. 276, 284; 66 L. Ed. 938).

5. Whether the court erred in denying the petitioner an opportunity to reopen the case and her matters.

6. Whether it was error for the special inquiry officer to accept the statement of the inquiry officer as evidence once the petitioner sought to repudiate it on the ground that she was confused at the time of making it and on the further ground that she had no clear understanding of the charges involved (she being then unrepresented by any counsel or any person who could or did explain it to her).

7. Whether Section 242(b) of the Immigration Act, which provides that determination of deportability should be made *only upon the record made in a proceeding before a special inquiry officer, inherently*, and as construed and applied, is unconstitutional and in violation of the Fifth Amendment to the Constitution of the United States in that it deprives a person of the right to be confronted by witnesses, to be represented by counsel, to subpoena and produce witnesses in a fair and public hearing and to have a full court hearing on all the matters involved.

8. Whether Section 242(b) of the Immigration Act denied this petitioner free right to the access of the District Court, guaranteed by the Treaty with Austria.

9. Whether petitioner was dealt with fairly procedurally and whether she was accorded a fair hearing guaranteed by the Fifth Amendment to the Consti-

tion of the United States when she was questioned alone by an officer, accused in totalitarian fashion of wrong-doing, and not advised that she had the right to an attorney, or that she did not have to answer accusing or incriminating questions.

Whether Section 242, 1(b) Immigration and Naturalization regulations, inherently and as construed and applied is unconstitutional and violative of due process of law guaranteed by the 14th Amendment U. S. Constitution.

Galvan v. Press, 347 U.S. 522, 529, 530; 98 L. Ed. 911, 921.

10. Whether the terms "prostitute", as contained in Subsection 12 of 8 USC, Section 1501, is so vague, indefinite and uncertain as to fail to constitute a basis for deportation.

11. Whether the word "prostitute" has been erroneously and improperly construed and applied in this case, in any event.

12. Whether an alien is entitled to all the rights in an administrative procedure and hearing as she would have in a habeas corpus hearing and whether those rights have to be determined in the District Court of the United States in order to accord the alien a fair hearing, and a hearing such as is guaranteed by the treaty with Austria.

13. Whether Section 1105(a) of Title 8 (75 Stats. Sec. 650) is unconstitutional and in violation of due process of law and the equal protection of the laws in that it transfers to the Circuit Court of Appeals a proceeding to review the deportation of an alien without giving the alien a chance to be heard in the District Court by an adversary proceeding which is there available and by the production of witnesses for and on behalf of the alien and by the opportunity to be confronted by witnesses against the alien and to examine and cross-examine them.

REASONS FOR GRANTING THE WRIT

This case presents important and new questions of immigration law regarding the rights of an alien to an attorney and to a fair hearing before deportation and also rights under a treaty. It also involves construction of the term "prostitute", undefined by the statute. It has been held that an alien is entitled to due process of law the same as a citizen. *Galvin v. Press*, 347 U.S. 522, 529, 530; 98 L. Ed. 921. This case also involves construction of the new procedure under the Administrative Procedure Act on appeal from the Administrative Procedure Act, and Immigration Act.

See: *Rusk v. Cort*, 369 U.S. 367, 7 L. Ed. 2d 809.

The right to due process necessarily encompasses the right to have an attorney at *all* stages of her proceedings, not merely after she is lured to give a statement privately to an immigration officer.

Douglas v. California, 9 L.ed. 2d 811
Gideon v. Wainwright, 9 L.ed. 2d 789

Mrs. Greene was obviously ignorant of such a right and the investigating officer did not inform her that she would have the right to be represented by counsel and to be confronted by witnesses against her and not be forced, in effect, to confess perhaps some sexual peccadillos between her marriages.

Deportation can be as serious, or even more serious, than being confined to jail or prison. It amounts to banishment.

Galvin v. Press 347 U.S. 522, 529, 530
Fong Haw Jan v. Phelan, 333 U.S. 6, 10; 92 L.ed 433, 436
Ng Fung Ho v. White, 259 U.S. 276, 284

To one who has married an American, it means departure from our shores and termination, perhaps, of a marital relationship. Before this occurs, *Wong Yang Sung v. McGrath*, 339 U.S. 33, 49, 94 L. Ed 616, 628, due process of law requires that the person be represented by counsel. The words are well expressed in *Gideon v. Wainwright*, 9 L.ed. 2d 789, 805, also *Powell v. Alabama*, 287 U.S. 45, 77 L.ed. 158, apply here:

"First. The record shows that immediately upon the return of the indictment defendants were arraigned and pleaded not guilty. *Apparently they were not asked whether they had, or were able to employ, counsel, or wished to have counsel appointed; or whether they had friends or relatives who might assist in that regard if communicated with.* That it would not have been an idle ceremony to have given the defendants reasonable opportunity to communicate with their families and endeavor to obtain counsel is demonstrated by the fact that very soon after conviction able counsel appeared in their behalf. This was pointed out by Chief Justice Anderson in the course of his dissenting opinion. "They were nonresidents," he said, "and had little time or opportunity to get in touch with their families and friends who were scattered throughout two other states, and time has demonstrated that they could or would have been represented by able counsel had a better opportunity been given by a reasonable delay in the trial of the cases judging from the number and activity of counsel that appeared immediately or shortly after their conviction." 224 Ala. at pp. 554, 555, 141 So. 201.

"It is hardly necessary to say that the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice. Not only was that not done here, but such designation

of counsel as was attempted was either so indefinite or so close upon the trial as to amount to a denial of effective and substantial aid in that regard. This will be amply demonstrated by a brief review of the record.

"It has never been doubted by this court, or any other so far as we know, that notice and hearing are preliminary steps essential to the passing of an enforceable judgment, and that they, together with a legally competent tribunal having jurisdiction of the case, constitute basic elements of the constitutional requirement of due process of law. The words of Webster, so often quoted, that by 'the law of the land' is intended 'a law which hears before it condemns,' have been repeated in varying forms of expression in a multitude of decisions. In *Holden v. Hardy*, 169 U.S. 366, 389, 42 L.ed. 780, 790, 18 S.Ct. 383, the necessity of due notice and an opportunity of being heard is described as among the 'immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard.' And Mr. Justice Field, in an earlier case *Galpin v. Page*, 18 Wall. 350, 368, 369, 21 L.ed. 959, 963, 964, said that the rule that no one shall be personally bound until he has had his day in court was as old as the law, and it meant that he must be cited to appear and afforded an opportunity to be heard. 'Judgment without such citation and opportunity wants all the attributes of

a judicial determination it is judicial usurpation and oppression, and never can be upheld where justice is justly administered.' Citations to the same effect might be indefinitely multiplied, but there is no occasion for doing so.

"What, then, does a hearing include? Historically and in practice, in our own country at least, it has always included the right to the aid of counsel when desired and provided by the party asserting the right. The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect. If in any case, civil or criminal, a state or federal court were

arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.

"The decisions all point to that conclusion. In *Cooke v. United States*, 267 U.S. 517, 537, 69 L.ed 767, 774, 45 S.Ct. 390, it was held that where a contempt was not in open court, due process of law required charges and a reasonable opportunity to defend or explain."

Any doubt in the interpretation of an immigration statute must be resolved in favor of the alien because of the drastic consequences of deportation.

Barber v. Gonzales, 347 U.S. 637, 642
Fong Haw Tanse. Phelan, 333 U.S. 6, 92 L.ed. 433
Holtzapfel v. Wyrsch, 259 F. 2d 890, 893
Saukow v. Immigration and Naturalization Service, 314 F. 2d 34, 37

Here we have a woman ignorant of her rights, confronted by an officer conducting an investigation in the form of cross-examination and leading questions to establish a deportability. No friend or person or lawyer was there to advise her or tell her what her rights were. The recent cases of this court, *Douglas v. California*, 9 L. Ed. 2d 811; and *Gideon v. Wainwright*, 9 L. Ed. 2d 789, holding that indigents may have an

attorney appointed for them, express rights which certainly should apply under our treaty arrangements with Austria that citizens of that country are to be treated with like dignity as the most favored nation and with like dignity to our own citizens and to have the same rights through the courts as our own citizens. Certainly, to proceed upon the statements of a hearing officer in the privacy of his offices smacks too much of prolatarian countries and is not the example which we hold out.

This court should therefore grant a hearing to decide that before an alien may be questioned and a statement taken for deportation that she will be entitled to the benefit of counsel at all stages of the proceedings from the very commencement. Like the *McNabb* case, where statements are taken without such benefit or right of counsel being granted and prior to arraignment in the criminal case, the statements of an accused cannot be used.

A hearing should also be granted to determine if our treaty arrangements with Austria give to Austrian subjects the same rights and privileges through our courts as our own citizens in our courts.

In all other declaratory relief actions, the persons coming into court have a right to appear in the District Court to subpoena witnesses and to have a trial in the real sense of the word. In this case, the defendant was denied such a trial; had no opportunity to be

heard in the District Court or to produce witnesses or to challenge the procedure in a court where the right of subpoena, of process of examination and cross-examination and the other basic rights of a trial are preserved.

Another reason why this court should grant a hearing is that the statute involved does not define the word "prostitution." This word has varying meanings in varying states. The case quoted by the Circuit Court was a Mann Act case involving a sect practicing polygamy. The definition quoted as to prostitution was a definition from the *Oxford English* Dictionary. Different states have different definitions, but the important point is that the Immigration statute itself fails to define the word. A statute which is so vague, indefinite and uncertain should not form the basis for a deportation order. Aliens who may face deportation have as much right to know what the law means as Americans charged with crime.

Nor is the word construed here even with its English meaning as given by the Circuit Court. As stated in the opinion, the alleged admissions of the petitioner were gifts by men who had appreciated, perhaps, her personal favors in the light of her charming personality. That all of this occurred with a normal woman, in between marriages, has been the occasion of consideration by District judges, one of whom stated that if the applicant for citizenship frankly told the court

of such conduct he would believe she was honest and worthy of admission, whereas if she denied it, he would know she was lying and unworthy of admission.

Since this court has not defined or determined the meaning of the word or how it should be construed and applied in immigration cases (on account of its uncertainty), a hearing should be granted by this court.

The court is also called upon to determine whether any of these acts, if true, would be sufficient for deportation in the light of the fact that all of them occurred *prior* to her last entry into the United States. Having determined at her last entry that she could properly be admitted, the determination was *res judicata* and final.

Another reason for the granting of the writ is that there has been no compliance, in fact, with the provisions of Section 242(b) of the Immigration and Naturalization Act, which requires that before there can be deportation, the evidence supporting such deportation must be *reasonable*, *substantial* and *probative*. We submit that there was no evidence submitted except the statement of a hearing officer, taken privately, almost in camera, as it might be taken in a totalitarian country, and that this is the basis for the deportation. Such a statement is not reasonable, substantial and probative evidence, as required by law. (Sec. 242.14. Immigration and Naturalization Section Title 8, C.

& R.) In a criminal case it would be excluded as having been obtained in violation of due process of law. No less should be the case here.

Substantial evidence is not met by evidence which gives equal support to inconsistent inferences.

NLRB v. Shen. Valley Meat Packers, Inc., 211 F. 2d 289, 293;

Zito v. Moital, 174 F. Supp. 531;

Sawkow v. Immigration and Naturalization Service, 314 F. 2d 34, at 38.

It is further submitted that Congress, in providing that an order of the Immigration and Naturalization Service might be heard upon declaratory relief but that the only appeal for review would be in the Court of Appeals, is unconstitutional and unfair in that it deprives the petitioner, and other persons similarly situated, of a full hearing in the District Court where the processes of the Court on a declaratory relief trial enable the bringing of witnesses into court and the presentation of evidence similar to a *habeas corpus* proceeding in the event the petitioner had been placed in custody. Such a novel procedure to provide only for review in the Circuit Court deprived the petitioner of her day in court and of the rights that she would have in a declaratory relief trial in the District Court where

she would be treated with rights accorded American citizens—have the right to produce witnesses and present evidence and be heard in accordance with usual trial procedure.

Section 1105a, as now amended, deprived petitioner of her day in court and only gave her an *appellate review* of an administrative agency. This is contrary to the treaty with Austria, to allow their citizens full access to the courts the same as ours, and is violative of due process.

WHEREFORE, petitioner prays that this Honorable Court grant certiorari and review and reverse the orders of the court below.

Respectfully submitted,

MORRIS LAVINE,
Attorney for Petitioner.